court directed a verdict against, taking it away from the jury, removing it from its consideration and thus holding it non-existent, it is difficult for the petitioners to understand how they could be convicted of lying about something that the court thought so little of that it dismissed it from the jury's consideration. By this directed verdict for mail fraud, the court effectually found that there was no conspiracy to steal. How then can false swearing be predicated of CHERETON's failure to give the answer the District Attorney wanted him to give: that this was a conspiracy to steal.

Even "Words and Phrases" legally defines perjury as:

> "wilful false swearing to a substantially definite and material *fact.*"

Unquestionably, the instant Circuit Court decision, certiorari of which is sought, conflicts with this holding of *Margolis* v. *U. S.*, 138 F 2d 1002, 1005:

> "IT IS AXIOMATIC THAT THE EXPRESSION OF AN OPINION WHICH IS IRRELEVANT CANNOT BE THE SUBJECT OF PERJURY."

There further has been completely overlooked the conflict with the two-witness rule requiring the testimony of two witnesses, both as to falsity and knowing falsity for any conviction of false oath or perjury.

See *Young* v. *U. S.*, 212 F 2d; *May* v. *U. S.*, 280 F 2d 555; and *Weiler* v. *U. S.*, 65 S. Ct. 548, holding:

> "SINCE EQUALLY HONEST WITNESSES MAY WELL HAVE DIFFERING RECOLLECTIONS OF THE SAME EVENT . . . A CONVICTION FOR PERJURY OUGHT NOT TO REST UPON THE OATH OF ONE."

And, we might add, particularly not in the instant case, where the one witness was a convicted co-conspirator.

In the instant case the proof fails utterly to show that the defendant knew that his answers were not true. For

the clear conflict here with *Meer* v. *U. S.*, 235 F 2d 65, holding that facts showing materiality is indispensable; for the clear conflict with *Rudin* v. *United States*, 254 F 2d 45, holding that the indictment must allege the necessary ingredients; and for the clear conflict with *United States* v. *Margolis*, 138 F 2d 1002, holding that no conviction may be had for an opinion or conclusion of law, and for the further holding that the comments of the court invading the province of the jury were corrected by the general instruction of the court, we respectfully pray that a re-hearing may be granted, so the injustice and the severe miscarriage of justice herein set out may be demonstrated.

MOTION NUNC PRO TUNC

The Petitioner herein moves for a order for extension of time so that the original Petition for Certiorari be considered as timely filed in view of the fact that any delay of filing the original Petition for Certiorari was caused by the error of the Clerk of the Circuit Court mailing the record directly to Fred R. Walker, Attorney for Petitioner, to Detroit, Michigan, instead of mailing same direct to the Clerk of the Supreme Court in Washington, D. C.

WHEREFORE, your Petitioner prays for an order nunc pro tunc that said original Petition for Certiorari be taken and considered as timely filed.

CONCLUSION

In view of the importance of the questions involved to the bench and bar, the conflict of the instant decision with the unreversed decisions of other Circuits, and with the impairment of the Petitioner's constitutional right, it is respectfully requested that this petition be granted and that, pending a hearing, this Honorable Court, or a Justice thereof, will order the mandate herein recalled and notifica-

tion thereof to be withheld, as required under Rule 25 of The Supreme Court Rules.

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Certificate of Counsel

The undersigned, Montague Rosenberg, attorney for petitioner herein, hereby certifies that the Petition for Rehearing herein is presented in good faith and not for delay, and that in his judgment said petition is restricted to grounds permitted by Rule 58 of this Court.

MONTAGUE ROSENBERG
Attorney for Petitioner